Supreme Court, U.S.
FILED

Docket No. 97-204 JUL 31 1997

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

KEENA WHITE, by her Personal Representative,Cindy White, CINDY WHITE, Individually, and Cindy White as Guardian ad Litem for DEIDRE JONES, CLIFFORD WHITE, JR., PATRIC WHITE, DANIEL WHITE, and DARREN WHITE,

Petitioners,

-- against --

RUBY CHAMBLIS; TINA WERTS; TANGA GILCHRIST; CLARENCE GRAHAM; CASSIE WILSON; MARIE DUNNAM; RAMONA FOLEY; BARRY DOWD; WILBERT LEWIS; JAMES C. SOLOMON, JR.; JOANNE SCHAEKEL; DESIREE COUNCIL,

Respondents,

-- and --

ANTHONY BONNER, GLADYS BONNER, and TONY BONNER,

Defendants.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

KEENA WHITE, by her Personal Representative Cindy White; CINDY WHITE, individually, and Cindy White as Guardian Ad Litem for Deidre Jones, Clifford White, Jr., Patric White, Daniel White and Darren White,

Plaintiffs-Appellees,

v.

RUBY CHAMBLISS,

Defendant-Appellant,

and

TINA WERTS; TANGA GILCHRIST; CLARENCE GRAHAM; CASSIE WILSON; MARIE DUNNAM; RAMONA FOLEY; BARRY DOWD; WILBERT LEWIS; JAMES C. SOLOMON, JR.; JOANNE SCHAEKEL; ANTHONY BONNER; GLADYS BONNER; TONY BONNER; AIKEN COUNTY DEPARTMENT OF SOCIAL SERVICES (ACDSS); DESIREE COUNCIL,

Defendants.

No. 95-3025

KEENA WHITE, by her Personal Representative Cindy White; CINDY WHITE, individually, and Cindy White as Guardian Ad Litem for Deidre Jones, Clifford White, Jr., Patric White, Daniel White and Darren White,

Plaintiffs-Appellees,

v.

TINA WERTS; TANGA GILCHRIST; CLARENCE GRAHAM; MARIE DUNNAM; RAMONA FOLEY; BARRY DOWD; WILBERT LEWIS; JAMES C. SOLOMON, JR.; JOANNE SCHAEKEL; DESIREE COUNCIL,

Defendants-Appellants,

and

CASSIE WILSON; ANTHONY BONNER; GLADYS BONNER; TONY BONNER; AIKEN COUNTY DEPARTMENT OF SOCIAL SERVICES (ACDSS); RUBY CHAMBLISS,

Defendants.

No. 95-3078

KEENA WHITE, by her Personal Representative Cindy White; CINDY WHITE, individually, and Cindy White as Guardian Ad Litem for Deidre Jones, Clifford White, Jr., Patric White, Daniel White and Darren White,

Plaintiffs-Appellees,

v.

CASSIE WILSON,

Defendant-Appellant,

and

TINA WERTS; TANGA GILCHRIST; CLARENCE GRAHAM; MARIE DUNNAM; RAMONA FOLEY; BARRY DOWD; WILBERT LEWIS; JAMES C. SOLOMON, JR.; JOANNE SCHAEKEL; ANTHONY BONNER; GLADYS BONNER; TONY BONNER; AIKEN COUNTY DEPARTMENT OF SOCIAL SERVICES (ACDSS); DESIREE COUNCIL; RUBY CHAMBLISS,

Defendants.

No. 95-3088

Appeals from the United States District Court
for the District of South Carolina, at Aiken.
Charles E. Simons, Jr., Senior District Judge.
(CA-93-3058-1-6)

Argued: March 6, 1997

Decided: April 30, 1997

Before WILKINSON, Chief Judge, LUTTIG, Circuit Judge, and BLACK, Senior United States District Judge for the District of Maryland, sitting by designation.

Reversed by published opinion. Chief Judge Wilkinson wrote the opinion, in which Judge Luttig and Senior Judge Black joined.

COUNSEL

ARGUED: Elizabeth Herlong Campbell, NEXSEN, PRUET, JACOBS & POLLARD, L.L.P., Columbia, South Carolina, for Appellants. Sara M. Walker, Columbia, South Carolina, for Appellees. **ON BRIEF:** Susan P. McWilliams, NEXSEN, PRUET, JACOBS & POLLARD, L.L.P., Columbia, South Carolina; Charles E. Carpenter, Jr., RICHARDSON, PLOWDEN, CARPENTER & ROBINSON, P.A., Columbia, South Carolina; Douglas McKay, Jr., Ruskin C. Foster, MCKAY, MCKAY, HENRY & FOSTER, P.A., Columbia, South Carolina; William L. Pope, Roy F. Laney, POPE & ROGERS, Columbia, South Carolina, for Appellants.

OPINION

WILKINSON, Chief Judge:

Cindy White brought suit under 42 U.S.C. § 1983 against several officials of the South Carolina Department of Social Services ("the DSS defendants"). White claims the DSS defendants violated her substantive and procedural due process rights by removing her children from her custody and violated her daughter Keena's rights by placing Keena in a home where she died from abuse at the hands of her foster parents. The district court denied the DSS defendants' motion for summary judgment, and those defendants now appeal.

Keena's death was a tragic event. It did not, however, result from the DSS defendants' violation of any "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Accordingly, we find that the DSS defendants were entitled to qualified immunity and reverse the judgment of the district court.

I.

Late on the night of November 20, 1991, Cindy White brought her eighteen-month-old son, Daniel, to the emergency room of the University Hospital in Augusta, Georgia with a broken arm. The treating physician, Dr. Shearer, determined that Daniel had sustained a spiral fracture to his arm. A spiral fracture is caused by a powerful twisting force and is a strong indicator of child abuse. Because White was a South Carolina resident, the hospital staff contacted the Aiken County DSS office to report a suspected case of abuse.

When Tanga Gilchrist, the DSS employee on call, arrived at the hospital, she questioned White about Daniel's injury. White claimed she was not in Daniel's bedroom when he broke his arm, but speculated he might have fallen out of his crib and caught his arm in its slats. Dr. Shearer and an orthopedist, Dr. Hankerson, both found White's explanation to be "very unlikely," and Dr. Shearer stated that "the child needed to be in custody."

On November 22, Gilchrist visited the White residence to investigate Daniel's bed and see for herself whether Daniel's injury might have occurred as the result of a fall. She found that the slats of the bed were far enough apart that her arm, which was larger than Daniel's, did not get caught between them. She further noted that Daniel's bed was less than one foot from the floor. This investigation, in combination with the two doctors' opinions, convinced Gilchrist that White's explanation of Daniel's broken arm was implausible. Gilchrist and her supervisor, Ruby Chambliss, determined that an *ex parte* petition for custody of White's children should be submitted to the Family Court for Aiken County.

On November 26, 1991, DSS filed a petition for emergency protective custody and a petition for removal in Aiken County Family Court. The judge signed an *ex parte* order granting emergency protective custody on November 26, which DSS received on December 3. On the day the order was received, Gilchrist and another case worker accompanied sheriff's office personnel to White's trailer and took custody of Daniel and the five other White children.

At a hearing the following day, which White attended, the judge determined that there was probable cause for the minor children to be

taken into emergency custody. The judge further concluded that in light of the evidence of abuse to Daniel, the children should remain with DSS pending a merits hearing. DSS placed the White children in various foster homes, with eleven-month-old Keena White going to the home of Anthony and Gladys Bonner.

In the weeks between the December 4 emergency protective custody hearing and the scheduled merits hearing, White was allowed supervised visitation with her children. During these visits, White alleges that she noticed scratches and bruises on her children, including Keena. She wrote a letter to Senator Strom Thurmond expressing her concerns. On December 20, Senator Thurmond wrote a letter to DSS on White's behalf. Cassie Wilson, one of the caseworkers on the White case, testified that White had told her that the children routinely sustained minor injuries due to playing or fighting with one another. Furthermore, Tina Werts, another caseworker, testified that she had taken Keena to the doctor with a cold on January 3, and that Keena had appeared to be in good condition on that date. DSS thus concluded that any alleged injuries were the "results of natural child play."

On January 18, 1992, approximately six weeks after she had been placed with the Bonners, Keena died from blows to the head while in the Bonners' care. A forensic pathologist determined that Keena's death was "best classified as homicide," but law enforcement officials were unable to determine who had struck Keena, so no criminal charges were filed. DSS removed all foster children from the Bonners' home and placed no other children with the Bonners after Keena's death. After an investigation, the DSS revoked the Bonners' license due to abuse and neglect.

At the merits hearing on January 24, 1992, DSS and White submitted a settlement agreement in which White agreed to acknowledge that Daniel White had been abused by an "unknown" perpetrator. DSS returned legal and physical custody of the children to White on the condition that she receive a psychological evaluation, including observation of the family unit, at the expense of DSS.

On November 18, 1993, White brought this lawsuit as personal representative of the estate of Keena for Keena's wrongful death, pain

and suffering, and violations of Keena's due process rights. She also sued as guardian *ad litem* for her five children and on her own behalf claiming DSS violated both her and her children's due process rights. Ruby Chambliss, Tanga Gilchrist, Cassie Wilson, Tina Werts, and various other DSS officials were named as defendants in the suit along with the Bonners.

After extensive discovery, the DSS defendants filed motions for summary judgment based on qualified immunity which were denied by the district court. The DSS defendants then filed the instant appeal.

II.

Under the doctrine of qualified immunity, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). White alleges constitutional violations in three phases of DSS's actions. First, she maintains that the DSS defendants violated her family's constitutional rights in the initial decision to remove her children. Second, she contends that Keena's due process rights were violated when she was placed with the Bonners. Lastly, she contends that the DSS defendants did not adequately protect Keena's safety after she was placed in the Bonners' care. We shall review these contentions in turn.[1]

A.

White first asserts that DSS unlawfully seized her children and that the illegal seizure violated her right to custody. This is no idle claim.

[1]The appeal of the district court's denial of qualified immunity is properly before this court on interlocutory review. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). In this case, the district court failed to make any findings or undertake any analysis in support of its denial of qualified immunity. As a result, we must engage in an independent examination of the record, viewed in the light most favorable to the nonmoving party. *Johnson v. Jones*, 115 S.Ct. 2151, 2159 (1995); *Winfield v. Bass*, 106 F.2d 525, 533 (4th Cir. 1997) (en banc).

As we have recognized, "[t]here are few rights more fundamental in and to our society than those of parents to retain custody over and care for their children, and to rear their children as they deem appropriate." *Jordan ex rel. Jordan v. Jackson*, 15 F.3d 333, 342 (4th Cir. 1994). These rights, however, are not absolute. The parent's right to custody is subject to the child's interest in his personal health and safety and the state's interest as *parens patriae* in protecting that interest. *Id.* at 346; *see also Renn v. Garrison*, 100 F.3d 344, 349 (4th Cir. 1996).

The DSS defendants removed the White children under the authority of law which this court has adjudged constitutional. South Carolina law limits the state's authority to assume emergency protective custody over children to those circumstances where "there is probable cause to believe that by reason of abuse or neglect there exists an imminent danger to the child's life or physical safety." S.C. Code § 20-7-610(F)(2); *see also* S.C. Code § 20-7-610 (A)(1). Recently we upheld the constitutionality of a Virginia statute which similarly constrained the state's power to take emergency custody of children, noting that "[w]hile there is always a risk of error when an emergency removal of a child from his parents' custody is required, the Commonwealth has substantially reduced that risk at the threshold by the imposition of significant substantive limitations upon the removal authorization." *Jordan*, 15 F.3d at 346.

Moreover, substantial evidence supported the DSS defendants' decision to pursue an order for the removal of the White children. Gilchrist sought the opinions of two medical professionals who told her that the spiral fracture Daniel had suffered was strong evidence of child abuse. Gilchrist also consulted with White and listened to her explanation of Daniel's injury. Gilchrist was entitled to rely on the professional judgments of the two physicians that White's explanation of Daniel's injury was "highly unlikely." *See Youngberg v. Romeo*, 457 U.S. 307, 324-25 (1982); *Hogan v. Carter*, 85 F.3d 1113, 1117 (4th Cir. 1996) (en banc). Moreover, Gilchrist's examination of Daniel's crib further demonstrated that White's explanation of Daniel's injury was implausible. Gilchrist thus came to the reasonable conclusion that there was a significant probability of child abuse within the White household. And, as we held in *Weller v. Dep't of Social Servs. for Baltimore*, 901 F.2d 387, 391 (4th Cir. 1990), removal of a child

in an emergency action is constitutional when there is "some evidence of child abuse."

White also contends that she and her children were denied procedural due process. We disagree. The Fourteenth Amendment interest that White possesses runs to court proceedings provided under state law and not to the discretionary discharge by DSS of its duties. *Weller*, 901 F.2d at 392. As to those court procedures, we have noted that "the requirements of process may be delayed where emergency action is necessary to avert imminent harm to a child." *Jordan*, 15 F.3d at 343; *Weller*, 901 F.2d at 393. In this case, DSS sought a judicially approved *ex parte* order before removing the White children. Furthermore, a full hearing was held within twenty-four hours of the removal. DSS therefore fully complied with this circuit's directive that such a hearing should be held soon after an emergency removal. *Jordan*, 15 F.3d at 351. In *Jordan*, we approved a hearing which was held some 65 hours after a child was removed from his home. Perforce, the much prompter hearing held in this case cannot be judged constitutionally invalid. Under these circumstances, we cannot conclude that White was denied the process she was due.[2]

The discretionary judgment which was made in removing the White children was obviously not an easy one. It involved weighing professional opinions of child abuse against the obvious interests in maintaining the integrity of a household. Here the tug and pull of competing concerns is evident. Premature action by a social worker can disrupt the legitimate interest parents possess in raising and disciplining their children. On the other hand, a failure to act can leave a child defenseless in the face of physical abuse and brutality. These types of decisions are precisely the sort that the doctrine of qualified immunity is designed to protect. *See Wood v. Strickland*, 420 U.S.

[2]White also alleges that she and her children were denied their constitutional right of access to the courts. White does nothing more, however, than posit the existence of an abstract right, and that is not sufficient to defeat qualified immunity. *See Anderson v. Creighton*, 483 U.S. 635, 640-41 (1987); *Pritchett v. Alford*, 973 F.2d 307, 312 (4th Cir. 1992). White has failed to point to any facts which would demonstrate that her or her children's right of access to the courts was violated by the DSS defendants in this case.

308, 319-20 (1975). If section 1983 liability attaches too readily to removal and placement decisions, the course of public agencies would invariably become one of inaction, thus leaving children in abusive environments. The facts presented by White reveal that the DSS defendants violated no "clearly established" law in removing White's children from her custody. Therefore, qualified immunity must lie. *Harlow*, 457 U.S. at 818.

B.

White next claims that the DSS defendants violated Keena's constitutional rights when they placed her in the Bonner home. A negligent placement, of course, would implicate no federal rights for questions of negligence have long been regarded by the Supreme Court as within the province of state law. *Daniels v. Williams*, 474 U.S. 327, 328 (1986). White, however, refers us to circuit cases where DSS defendants were alleged to have crossed the line from negligence into deliberate indifference thus implicating substantive Fourteenth Amendment protections. *See K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 852 (7th Cir. 1990) ("The only right in question in this case is the right of a child in state custody not to be handed over by state officers to a foster parent or other custodian, private or public, whom the state knows or suspects to be a child abuser."); *accord Meador v. Cabinet for Human Resources*, 902 F.2d 474, 476 (6th Cir. 1990); *Taylor v. Ledbetter*, 818 F.2d 791, 797 (11th Cir. 1987); *Doe v. New York City Dept. of Social Servs.*, 649 F.2d 134, 141 (2d Cir. 1981).

Whatever the clearly established law on this question, White's claim simply falls short on the facts. The summary judgment record contains no evidence to indicate that any of the DSS defendants knew or suspected that the Bonners were abusive foster parents when they placed Keena in their care. Indeed, the Bonners were licensed by the DSS, and White points to no evidence indicating that the Bonners had previously been accused of, or investigated for, child abuse. A claim of deliberate indifference, unlike one of negligence, implies at a minimum that defendants were plainly placed on notice of a danger and chose to ignore the danger notwithstanding the notice. There is simply no evidence that the DSS defendants were on notice of any problem at the time the placement decision was made.

C.

White also asserts that the DSS defendants had a clearly established duty to protect Keena from abuse after she was placed with the Bonners. In order for a right to be "clearly established," the Supreme Court has instructed that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

In *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989), the Supreme Court held that the state had no affirmative duty to protect a child from abuse when that child was not in state custody. However, the Court specifically declined to determine whether placing a child in foster care would constitute the sort of custodial relationship that would give rise to a duty of protection. *Id.* at 201 n.9. By 1991, when the events relevant to the instant suit occurred, this circuit had squarely held that children placed in foster care had no federal constitutional right to state protection. In *Milburn v. Anne Arundel County Dep't of Social Servs.*, 871 F.2d 474 (4th Cir. 1989), the court considered a claim brought by parents who had placed their child in the state foster care system. While in foster care, the child was subjected to abuse and required medical treatment on four separate occasions. The child's parents brought suit against the state DSS and several officers of the DSS alleging that they had breached the child's right to protection. The court noted that the state had no affirmative constitutional obligation to protect individuals against private violence, *id.* at 476, and went on to reject the parents' claim, reasoning that foster parents were private actors and not agents of the state:

> The State of Maryland was not responsible for the specific conduct of which plaintiff complains, that is, the physical child abuse itself. It exercised no coercive power over the Tuckers; neither did it encourage them. The care of foster children is not traditionally the exclusive prerogative of the State. Thus . . . the Tuckers should not be considered state actors.

Id. at 479 (citations omitted).

Nothing in *Milburn* limited its application to situations where parents had voluntarily placed their children in foster care, and *Milburn* was not interpreted as being so limited in subsequent Fourth Circuit cases. In *Weller*, for example, the court relied on *Milburn* for the proposition "that harm suffered by a child at the hands of his foster parents is not harm inflicted by state agents." 901 F.2d at 392. Given the state of this circuit's law on the issue and the absence of controlling Supreme Court authority, we cannot say that a right to affirmative state protection for children placed in foster care was clearly established at the time of Keena's death.

White next argues that the South Carolina Child Protection Act forms the basis of a clearly established right to protection while in foster care which is enforceable under 42 U.S.C. § 1983. We disagree. The Supreme Court has made clear that section 1983 provides a cause of action for "violations of federal statutory as well as constitutional law." *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980). Following *Thiboutot*, this circuit explicitly rejected the contention that state child welfare statutes create substantive due process rights enforceable through section 1983. For example, in *Weller*, we held: "If Weller is seeking compliance with state law, this is not the proper forum. Even if BCDSS did violate state laws, it is well settled that violations of state law cannot provide the basis for a due process claim." 901 F.2d at 392 (citation omitted); *see also Hodge v. Jones*, 31 F.3d 157, 168 (4th Cir. 1994). Indeed, this circuit has specifically rejected the contention that the very statute at issue in this case — the South Carolina Child Protection Act — creates substantive rights enforceable through a section 1983 action. *See Jensen v. Conrad*, 747 F.2d 185, 195 n.12 (4th Cir. 1984).[8]

[8]Our decision in *Better Government Bureau, Inc. v. McGraw*, 106 F.3d 582 (4th Cir. 1997), is not to the contrary. That case referred to state law to determine only whether an official performed an act "clearly established to be beyond the scope of his discretionary authority." *Id.* at 592. *Better Government Bureau*, therefore, is inapplicable here as the defendants in this case are being sued for discretionary judgment calls that clearly fell within the scope of their duties as social workers. Moreover, *Better Government Bureau* had not been decided when the actions relevant to this suit occurred.

Because the South Carolina Child Protection Act does not create a clearly established substantive federal right, the immunity claims of the DSS defendants do not rise or fall on questions of state law. As we noted in *Jordan*, the whole area of domestic relations has "'been left to the States from time immemorial, and not without good reason.'" 15 F.3d at 348 (quoting *Santosky v. Kramer*, 455 U.S. 745, 770 (1982) (Rehnquist, J., dissenting)). Domestic violence of all varieties is one of the most wrenching problems that any society must face, but to federalize the issue through the vehicle of section 1983 is not the answer. That is not to say that there should be no remedy, but rather that where state officials acting within the scope of their discretionary duties commit violations of state law, one must look to state law and to state courts to pursue those remedies that the state has provided. In South Carolina, for example, aggrieved individuals may pursue a state law cause of action under the South Carolina Child Protection Act for public officials' alleged failures to abide by the directives of that statute. *See Jensen v. Anderson County Dep't of Social Servs.*, 403 S.E.2d 615, 617 (S.C. 1991).

Lastly, White argues that since South Carolina receives federal funds for its child welfare program, plaintiffs had an enforceable right to protection through the provisions of the federal Adoption Assistance and Child Welfare Act ("AACWA"). Specifically, White points to 42 U.S.C. § 671(a)(10), which states:

> In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which —
>
> > (10) provides for the establishment or designation of a State authority or authorities which shall be responsible for establishing and maintaining standards for foster family homes and child care institutions which are reasonably in accord with recommended standards of national organizations concerned with standards for such institutions or homes, including standards related to admission policies, safety, sanitation, and protection of civil rights, and provides that the standards so established shall be applied by the State to any foster

> family home or child care institution receiving funds under this part or part B of this subchapter.

The Supreme Court addressed the availability of privately enforceable rights under the AACWA in *Suter v. Artist M.*, 503 U.S. 347 (1992). Section 671(a)(15) of that statute requires a state to make "reasonable efforts" to return children placed in foster care to their homes. The Court held that this section created no private right of action under section 1983 because (1) the section did not state a clear requirement of any conditions on state receipt of federal grants, *id.* at 356-57; (2) the statute did not include any "statutory guidance . . . as to how 'reasonable efforts' are to be measured," *id.* at 360; and (3) section 42 U.S.C. § 671(b) provided for the establishment of an alternative enforcement mechanism, *id.* at 360-61.

For the same reasons, section 671(a)(10) does not create an enforceable right. The requirement that a state's plan be "reasonably in accord with recommended standards of national organizations," is no more specific than section 671(a)(15)'s "reasonable efforts" requirement. Furthermore, the AACWA provides no "statutory guidance" to clarify the meaning of the requirements of 671(a)(10). Lastly, section 671(a)(10) is enforceable through the same alternative enforcement mechanism provided for section 671(a)(15). As the Supreme Court noted in *Suter*, "[t]he Secretary [of Health and Human Services] has the authority to reduce or eliminate payments to a State on finding that the State's plan no longer complies with § 671(a) or that 'there is a substantial failure' in the administration of a plan such that the State is not complying with its own plan." 503 U.S. at 360. *Suter* thus forecloses the argument that section 671(a)(10) of the AACWA provides the source for an enforceable right through section 1983. *See also Wildauer v. Frederick County*, 993 F.2d 369, 373 (4th Cir. 1993).[4]

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[4]The congressional response to *Suter* codified at 42 U.S.C. § 1320a-2 does not alter our view. As an initial matter, that response came after the events relevant to this case. Further, Congress made clear that the statute was "not intended to alter the holding in *Suter v. Artist M.* that section 671(a)(15) . . . is not enforceable in a private right of action." 42 U.S.C. § 1320a-2. Lastly, *Suter* itself was not a novel holding, but rather rested upon settled legal principles with regard to private rights of action in the context of the AACWA.

We are again mindful that this case has involved the loss of a child's life. We are unable, however, from the record before us to attribute this sad occurrence to constitutional or federal statutory defalcations of the defendants in this case. The only evidence in the record indicating potential abuse by the Bonners is White's complaint regarding bruises and scratches on Keena and her other children. White, however, had told Cassie Wilson, a DSS caseworker, that her children often sustained such injuries in the course of playing or fighting. Furthermore, Tina Werts, another caseworker, took Keena to the doctor for a cold on January 3 and observed that she appeared to be in good condition. Given these circumstances, DSS reasonably concluded that any scratches and bruises on Keena arose from normal child play.

We are reminded again that the defense of qualified immunity is often asserted in the most difficult of cases. Yet it is precisely for the hard case that the immunity exists. The availability of immunity cannot be judged solely by tragedies that later occur or by mistakes that later come to light. Knowing what we know now, no child would have been placed in the care of the Bonners. But now is not then, and few mortals stand unscathed by hindsight. The question under qualified immunity is thus whether fallible and imprescient human beings acted reasonably on the law as it stood and on the facts as they were known at the time the action was taken. *Anderson*, 483 U.S. at 641. On this record, we are unable to find that the standard of objective reasonableness applied to the actions of public officials has been transgressed.

III.

For the foregoing reasons, we conclude that the DSS defendants are entitled to qualified immunity. Because the district court erred in denying their motion for summary judgment, we hereby reverse.

REVERSED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AIKEN DIVISION

CIVIL ACTION NO. 1:93-3058-6

KEENA WHITE, by her personal representative Cincy White, CINDY WHITE, Individually, and CINDY WHITE as Guardian ad Litem for DEIDRE JONES, CLIFFORD WHITE, JR., PATRICK WHITE, DANIEL WHITE, and DARREN WHITE,	)	
Plaintiffs,	)	ENTERED 11/9/95
-vs-	)	ORDER
TINA WERTS, TANGA GILCHRIST, CLARENCE GRAHAM, RUBY CHAMBLIS, CASSIE WILSON, MARIE DUNNAM, RAMONA FOLEY, BARRY DOWD, WILBERT LEWIS, JAMES C. SOLOMON, JR., JOANNE SCHAEKEL, DESIREE COUNCIL, ANTHONY BONNER, GLADYS BONNER, and TONY BONNER,	)	
Defendants.	)	

This civil rights action, alleging the abuse and death of Keena White and the abuse of her siblings while in foster care, was brought against (1) certain employees of the Aiken County Department of Social Services in their individual capacities (Gilchrist, Werts,

Graham, Chambliss, Wilson, Dunnam); (2) certain employees of the South Carolina Department of Social Services in their individual capacities (Foley, Dowd, Lewis, Solomon, Schaekel, Council); and (3) the foster parents of Keena White, and the foster parents' son (Anthony, Gladys, and Tony Bonner).

The amended Complaint alleges that the Bonners caused the death of Keena White by child abuse and that the Bonners had previously abused other foster children and their own grandchildren. The other individual defendants are alleged to have contributed to the death of Keena White by their acts and/or omissions as they relate to the Bonner foster home and to Keena White and her family.

At the hearing on October 30, 1995, this court considered and denied cross Motions for Summary Judgment, concluding that disputes of material fact existed. The court also denied summary judgment to Department of Social Services defendants based upon their claim of qualified immunity.

Because the court is advised that defendants will appeal the ruling denying qualified immunity, it has drafted this memorandum Order in an effort to clarify the issues on appeal.

This court bases its denial of the qualified immunity defense urged by both state and county Department of Social Services defendants on the dual grounds that (1) during the time in question, there existed a constitutional right to protection on the part of those in the custody of the state, or having a special relationship with the state, so that defendants could have reasonably expected to know that a failure on their part to protect foster children placed by them in foster homes selected by them, or to properly train and supervise foster parents, could constitute a violation of plaintiffs' Fourteenth Amendment rights, and (2) since at least 1984, plaintiffs had a statutory right, pursuant to the South Carolina Child Protection Act, Sections 20-7-40, et seq., S.C. Code Ann., enforceable under 42 U.S.C. Section 1983, to the care and protection that they allege they were denied, such that defendants could not claim to exercise discretion in an area in which the law respecting their duties and

obligations was uncertain. See L.B. By and Through Darr v. Massinga, 838 F.2d 118, 122 (4th Cir. 1988); Compare Jenson v. Conrad, 747 F.2d 185 (4th Cir. 1984) (a case which did not involve foster care).

Pursuant to Harlow v. Fitzgerald, 457 U.S. 800 (1982), defendants' right to claim qualified immunity is determined by an objective test, rather that their subjective good faith belief. Thus, in denying qualified immunity to defendants, this court decides only that objectively defendants would not have been justified in doing, or in failing to do, what has been alleged. As the Court of Appeals recognized in Massinga, proof of the alleged nonfeasance and malfeasance "must await further proceedings." 838 F.2d at 1.

To recapitulate the decisions made by the court at the hearing, the court rules as follows:

(1) Plaintiffs' Motions for Summary Judgment and Partial Summary Judgment filed 9/1/95; 9/29/95; 10/10/95; 10/11/95 (3 Motions); 10/16/95 (2 Motions) are DENIED.

(2) Defendants' Motions for Summary Judgment and Partial Summary Judgment filed 9/13/95; 9/27/95; 10/13/95; 10/16/95 (2 Motions) are DENIED.

AND IT IS SO ORDERED.

/S/ CHARLES E. SIMONS, JR.
CHARLES E. SIMONS, JR.
SENIOR UNITED STATES DISTRICT JUDGE

Aiken, South Carolina
November 2, 1995

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
May 28, 1997

No. 95-3025
CA-93-3058-1-6

KEENA WHITE, by her Personal Representative Cindy White; CINDY WHITE, individually, and Cindy White as Guardian Ad Litem for Deidre Jones, Clifford White, Jr., Patrick White, Daniel White and Darren White,

Plaintiffs - Appellees

v.

RUBY CHAMBLIS

Defendant - Appellant

and

TINA WERTS; TANGA GILCHRIST; CLARENCE GRAHAM; CASSIE WILSON; MARIE DUNNAM; RAMONA FOLEY; BARRY DOWD; WILBERT LEWIS; JAMES C. SOLOMON, JR.; JOANNE SCHAEKEL; ANTHONY BONNER; GLADYS BONNER; TONY BONNER; AIKEN COUNTY DEPARTMENT OF SOCIAL SERVICES (ACDSS); DESIREE COUNCIL,

Defendants

No. 95-3078
CA-93-3058-1-6

KEENA WHITE, by her Personal Representative Cindy White;

CINDY WHITE, individually, and Cindy White as Guardian Ad Litem for Deidre Jones, Clifford White, Jr., Patrick White, Daniel White and Darren White,

Plaintiffs - Appellees

v.

TINA WERTS; TANGA GILCHRIST; CLARENCE GRAHAM; MARIE DUNNAM; RAMONA FOLEY; BARRY DOWD; WILBERT LEWIS; JAMES C. SOLOMON, JR.; JOANNE SCHAEKEL; DESIREE COUNCIL,

Defendants - Appellants

and

CASSIE WILSON; ANTHONY BONNER; GLADYS BONNER; TONY BONNER; AIKEN COUNTY DEPARTMENT OF SOCIAL SERVICES (ACDSS); RUBY CHAMBLISS

Defendants

No. 95-3088
CA-93-3058-1-6

KEENA WHITE, by her Personal Representative Cindy White; CINDY WHITE, individually, and Cindy White as Guardian Ad Litem for Deidre Jones, Clifford White, Jr., Patrick White, Daniel White and Darren White,

Plaintiffs - Appellees

v.

CASSIE WILSON

Defendant - Appellant

and

TINA WERTS; TANGA GILCHRIST; CLARENCE GRAHAM; MARIE DUNNAM; RAMONA FOLEY; BARRY DOWD; WILBERT LEWIS; JAMES C. SOLOMON, JR.; JOANNE SCHAEKEL; ANTHONY BONNER; GLADYS BONNER; TONY BONNER; AIKEN COUNTY DEPARTMENT OF SOCIAL SERVICES (ACDSS); DESIREE COUNCIL; RUBY CHAMBLISS

Defendants

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellees' petition for rehearing with suggestions for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

It is ordered that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court

/s/ Patricia S. Conner

CLERK

CONSTITUTIONAL PROVISIONS AND STATUTES

The Due Process Clause of the United States Constitution provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983 states: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

§ 627. Foster care protection required for additional payments

(a) Requisite additional steps to qualify. If, for any fiscal year after fiscal year 1979, there is appropriated under section 420 [42 USCS § 620] a sum in excess of $141,000,000, a State shall not be eligible for payment from its allotment in an amount greater than the amount for which it would be eligible if such appropriation were equal to $141,000,000, unless such State---

(1) has conducted an inventory of all children who have been in foster care under the responsibility of the State for a period of six months preceding the inventory, and determined the appropriateness of, and necessity for, the current foster placement, whether the child can or should be returned to his parents or should be freed for adoption, and the services necessary to facilitate either the return of the child or the placement of the child for adoption or legal guardianship; and

(2) has implemented and is operating to the satisfaction of the Secretary--

(A) a statewide information system from which the status, demographic characteristics, location, and goals for the placement of every child in foster care or who has been in such care within the preceding twelve months can readily be determined;

(B) a case review system (as defined in section 475 (5) [42 USCS § 675 (5)]) for each child receiving foster care under

the supervision of the State; and
(C) a service program designed to help children, where appropriate, return to families from which they have been removed or be placed for adoption or legal guardianship.

§ 671. State plan for foster care and adoption assistance

(a) Requisite features of state plan. In order for a state to be eligible for payments under this part [42 USCS §§ 670 et seq.], it shall have a plan approved by the Secretary which---

(1) provides for foster care maintenance payments in accordance with section 472 [42 USCS § 672] and for adoption assistance payments in accordance with section 473 [42 USCS §673];
(2) provides that the State agency responsible for administering the program authorized by part B of this title [42 USC §§ 620 et seq.] shall administer, or supervise the administration of, the program authorized by this part [42 USC §§ 670 et seq.];
(3) provides that the plan shall be in effect in all political subdivisions of the State and, if administered by them, be mandatory upon them;
(4) provides that the State shall assure that the programs a the local level assisted under this part [42 USC §§670 et seq.] will be coordinated with the programs at the state or local level assisted under parts A and B of this title [42 USC §§ 601 et seq., 620 et seq.], under title XX of this Act [42 USC §§ 1397 et seq.], and under any other appropriate provision of Federal Law;
(5) provides that the State will, in the administration of its programs under this part [42 USCS §§ 670 et seq.], use such methods relating to the establishment and maintenance of personnel standards on a merit basis as are found by the Secretary to be necessary for the proper and efficient operation of the programs, except that the Secretary shall exercise no authority with respect ti the selection, tenure of office, or compensation of any individual employed in accordance with such methods;
(6) provides that the State agency referred to in paragraph (2) (hereinafter in this part [42 USCS §§670 et seq.] referred to as the "state agency") will make such reports, in such form and containing such information as the Secretary may from time to time require, and comply with such provisions as the Secretary may from time to time find necessary to assure the correctness and verification of such reports;
(7) provides that the State agency will monitor and conduct periodic

evaluations of activities carried out under this part [42 USCS §§ 670 et seq.];

(8) provides safeguards which restrict the use of or disclosure of information concerning individuals assisted under the State plan to purposes directly connected with (A) the administration of the plan of the State approved under this part [42 USCS §§ 670 et seq.], the plan or program of the state under part A, B, C, or D of this title [42 USCS §§ 601 et seq., 630 et seq., 1201 et seq., `35` et seq., 1381 et seq.] (as in effect in Puerto Rico, Guam, and the Virgin Islands), XIX, or XX [42 USC §§ 1396 et seq., 1397 et seq.], or the supplemental security income program established by title XVI [42 USCS §§ 1381 et seq.], (B) any investigation, prosecution, or criminal or civil proceeding, conducted in connection with the administration of any such plan or program, © the administration of any other Federal or federally assisted program which provides assistance, in cash or in kind, or services, directly to individuals on the basis of need, and (D) any audit or similar activity conducted in connection with the administration of any such plan or program by any governmental agency which is authorized by law to conduct such audit or activity; and the safeguards so provided shall prohibit disclosure, to any committee or legislative body (other than an agency referred to in clause (D) with respect to an activity referred to in such clause), of any information which identifies by name or address any such applicant or recipient; except that nothing contained herein shall preclude a State from providing standards which restrict disclosure to purposes more limited than those specified herein, or which, in the case of adoptions, prevent disclosure entirely;

(9) provides that where any agency of the State has reason to believe that the home or institution in which a child resides whose care is being paid for in whole or in part with funds provided under this part [42 USCS §§ 670 et seq.] is unsuitable for the child because of the neglect, abuse, or exploitation of such child, it shall bring such condition to the attention of the appropriate court or law enforcement agency.

(10) provides for the establishment or designation of a State authority or authorities which shall be responsible for establishing and maintaining standards for foster family homes and child care institutions which are reasonably in accord with recommended standards of national organizations concerned with standards for such institutions or homes, including standards related to admission policies, safety, sanitation, and protection of civil rights, and provides

that the standards so established shall be applied by the State to any foster family home or child care institution receiving funds under this part [42 USCS §§ 670 et seq.] or part B of this title [42 USCS §§620 et seq.];

(11) provides for periodic review of the standards referred to in the preceding paragraph and amounts paid as foster care maintenance payments and adoption assistance payments to assure their continuing appropriateness;

(12) provides for granting an opportunity for a fair hearing before the State agency to any individual whose claim for benefits available pursuant to this part [42 USCS §§ 670 et seq.] is denied or is not acted upon with reasonable promptness;

(13) provides that he State shall arrange for a periodic and independently conducted audit of the programs assisted under this part [42 USCS §§670 et seq.] and part B of this title [42 USCS §§ 620 et seq.], which shall be conducted no less frequently than once every three years;

(14) provide (A) specific goals (which shall be established by State law on or before October 1, 1982) for each fiscal year (commencing with the fiscal year which begins on October 1, 1983) as to the maximum number of children (in absolute numbers or as a percentage of all children in foster care with respect to whom assistance under the plan is provided during such year) who, at any time during such year, will remain in foster care after having been in such care for a period in excess of twenty-four months, and (B) a description of the steps which will be taken by the State to achieve such goals;

(15) effective October 1, 1983, provides that , in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home;

(16) provides for the development of a case plan (as defined in section 475(1) [42 USCS § 675(1)] for each child receiving foster care maintenance payments under the State plan and provides for a case review system which meets the requirements described in section 475(5)(B) [42 USCS § 675(1)] for each child receiving foster care maintenance payments under the State plan and provides for a case review system which meets the requirements described in section 475(5)(B) [42 USCS § 675(B)] with respect to each such child; and

(17) provides that, where appropriate, all steps will be taken, including cooperative efforts with the State agencies administering the

plans approved under parts A and D [42 USCS §§ 601 et seq.], to secure an assignment to the State of any rights to support on behalf of each child receiving foster care maintenance payments under this part [42 USCS §§ 670 et seq.].

(b) Failure of State to comply with plan provisions. The Secretary shall approve any plan which complies with the provisions of subsection (a) of this section. However, in any case in which the secretary finds, after reasonable notice and opportunity for hearing, that a State plan which has been approved by the Secretary no longer complies with the provisions of subsection (a), or that in the administration of the plan there is a substantial failure to comply with the provisions of the plan, the Secretary shall notify the State that further payments will not be made to the State under this part [42 USCS §§670 et seq.] or that such payments will be made to the State but reduced by an amount which the Secretary determines appropriate, until the Secretary is satisfied that there is no longer any such failure to comply, and until he is so satisfied he shall make no further payments to the State or shall reduce such payments by the amount specified in his notification to the State.

§ 672. Foster care maintenance payments program

(a) Each State with a plan approved under this part [42 USCS §§ 670 et seq.] shall make foster care maintenance payments (as defined in section 475(4) [42 USCS § 675(4)] under this part [42 USCS §§ 670 et seq.] with respect to a child who would meet the requirements of section 406(a) [42 USCS § 606(a)] or of section 407 [42 USCS § 607] but for his removal from the home of a relative (specified in section 406(a) [42 USCS § 606(a)], if --

(1) the removal from the home was the result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child and (effective October 1, 1983) that reasonable efforts of the type described in section 471(a)(15) [42 USCS § 671(a)(15)] have been made;

(2) such child's placement and care are the responsibility of (A) the State agency administering the State plan approved under section 471 [42 USCS § 671], or (B) any other public agency with whom the State agency administering or supervising the administration of the State plan approved under section 471 [42 USCS § 671] has made an agreement which is still in effect;

(3) such child has been placed in a foster family home or child-care institution as a result of a determination referred to in paragraph (1); and

(4) such child --

(A) received aid under the State plan approved under section 402 [42 USCS § 602} in or for the month in which court proceedings leading to the removal of such child from the home were initiated, or (B)(i) would have been made therefor, or (ii) had been living with a relative specified in section 406(a) [42 USCS § 606(a)] within six months prior to the month in which such proceedings were initiated, and would have received such aid in or for such month if in such month he had been living with such a relative and application therefor had been made.

(b) Foster care maintenance payments may be made under this part [42 USCS § 670 et seq.] only on behalf of a child described in subsection (a) of this section who is --

(1) in the foster family home of an individual , whether the payments therefor are made to such individual or to a public or nonprofit private child-placement or child-agency, or

(2) in a child-care institution, whether the payments therefor are made to such institution or to a public or nonprofit private child-placement or child-care agency, which payments shall be limited so as to include in such payments only those items which are included in the term "foster care maintenance payments" (as defined in section 475(4) [42 USCS § 675(4)]).

(c) For the purposes of this part 42 USCS § 670 et seq.], (1) the term "foster family home" means a foster family home for children which is licensed by the State in which it is situated or has been approved, by the agency of such State having responsibility for licensing homes of this type, as meeting the standards established for such licensing; and (2) the term "child-care institution" means a nonprofit private child-care institution, or a public child-care institution which accommodates no more than twenty-five children, which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing or approval of institutions of this type, as meeting the standards established for such licensing, bu the term shall not include detention facilities, forestry camps, training schools, or any other facility operated primarily for the detention of children who are determined delinquent.

(d) For purposes of titles XIX and XX [42 USCS §§ 1396 et seq., 1397 et seq.], any child with respect to whom foster care maintenance payments are

made under this section shall be deemed to be a dependent child as defined in section 406 [42 USCS § 606] and shall be deemed to be a recipient of aid to families with dependent children under part A of this title [42 USCS §§ 601 et seq.]